IN THE

Supreme Court of The United States

October Term, 1963

No. [redacted] 11

DEWEY McLAUGHLIN and CONNIE HOFFMAN, also known as CONNIE GONZALEZ,

Appellants,

—vs—

THE STATE OF FLORIDA,

Appellee

RESPONSE OF APPELLEE TO JURISDICTIONAL STATEMENT

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OPINION BELOW

Appellee concedes that the pertinent opinion herein sought to be reviewed is that found in 153 So. 2d 1, 1963, and that such opinion is accurately duplicated in the appendix of appellants' jurisidictional statement.

JURISDICTION

Appellee concedes that appropriate jurisdiction to entertain this proceeding is vested in this court pursuant to 28 U.S.C., 1257.

QUESTIONS PRESENTED

Appellee will follow the questions presented on page four of the appellants' jurisdictional statement, but will add to such the question of the validity of the Fourteenth Amendment of the federal constitution, which amendment is the sole basis for each and every attack made by the appellants upon their convictions.

STATEMENT OF THE CASE

Appellee accepts appellants' statement of the case as the same appears in their brief at pages 4, 5, and 6 thereof only insofar as it reflects a true and correct resume of what the record below would, without conflict, reveal.

SUMMARY OF ARGUMENT

The act prohibited by Section 798.05, Florida Statutes (interracial cohabitation), is the same act which is prohibited to members of the same race by Section 798.02, Florida Statutes.

The provisions of Section 798.02, supra, provide a maximum punishment of two years of confinement while the provisions of 798.05, supra, (under which the appellants were prosecuted) provide a maximum punishment of one year confinement. Appellants are obviously in the favored class—if there be any—and are therefore not in a position to complain.

Appellants further are not in a position to complain because, as a matter of fact, and as conceded by appellants' brief on page 6, appellants received a sentence of thirty days and a fine of $150.00, or in default of such payment, an additional thirty-day term. Such sentence in effect is equivalent to a sentence of two months in the county jail. Appellants thus received a sentence of a term less than that authorized by Section 798.03, Florida Statutes, for offenses involving mere casual acts of fornication, as distinguished from the provisions of Section 798.02 and Section 798.05, Florida Statutes, which prohibit the greater indecency of general public cohabitation.

The question of interracial marriage is not involved in the instant case, as the defense of marriage was not available to the appellants, because there was not adequate evidence to give rise to such defense. The state is not called upon to negate the existence of the exception of marriage provided by the terms of Section 798.05, supra, nor is the state required to prove the negative, i.e., to prove that the defendants were not married. Marriage constitutes an affirmative defense which the defendants must prove.

There is much evidence which indicates that the defendants were not married to each other; however, the state acknowledges that such evidence is not pertinent to the question of whether the instructions of the trial judge (telling the jury that a common law marriage in this state between the defendants would not be valid) deprived the defendants of a defense of mar-

riage to which they would have otherwise have been entitled. The fact which is pertinent, however, is that the sole evidence which could possibly be utilized to support a defense of marriage is a statement given by a prosecuting witness that one of the defendants had related to such witness that such defendant was living in a common law marriage with the co-defendant. Such statement was clearly hearsay for the purpose of establishing a valid marriage. It is likewise clear that the statement itself is insufficient to establish a common law marriage insomuch as a representation from both defendants would have been necessary in order to establish such marriage. There was, therefore, insufficient evidence of a marriage between the defendants, and such defendants were thus not entitled to have such defense considered.

It is further urged that defendants did not object to the giving of the instruction regarding miscegenation, as is required by Section 918.10, Florida Statutes, and therefore the correctness of such instruction was never presented to the trial court, thus providing adequate state grounds for the appellate court's refusal to reverse the conviction on such basis.

The case of **Naim vs. Naim,** 350 U.S. 985, 100 L.Ed. 852, has previously established as precedent that a prohibition against interracial marriage does not give rise to a federal question.

Section 798.05, Florida Statutes, is not subject to a constitutional attack on the basis of ambiguity. The

court can take judicial knowledge of the fact that there exists a race known as the Negro race. The statute, when considered along with Section 1.01, Florida Statutes, defines a Negro as one who is at least a 12½% (⅛) full-blooded descendant of the Negro race. Since appellants have failed to arrange to present all of that evidence to this court which was before the jury, to wit: the presence of the defendants themselves—this court must presume that the Negro defendant has the racial characteristics of a 100% Negro and that the white defendant has the racial characteristics of a 100% Caucasian. Such evidence would certainly be sufficient to place the jury in a position to convict the appellants, after favoring them with every reasonable doubt on the issue of race.

It is further urged that since Article V of the federal constitution prohibits depriving the states of representation in the United States Senate, the court must accept as a **de jure** fact that the United States Senate at the time the Fourteenth Amendment was proposed, consisted of 72 members, two for each of the 36 then existing states. Article V of the federal constitution requires that a constitutional amendment be approved by ⅔ of the Senate; an affirmative proposal by the resulting ⅔ figure of 48 was not obtained. It therefore follows that the Fourteenth Amendment was not, as a matter of law, ever been constitutionally proposed. Such amendment being invalid, an essential base for each of the positions taken by the appellants is removed.

ARGUMENT

QUESTION I

WHETHER THE DEFENDANTS, BY BEING PROSECUTED UNDER A STATUTE WHICH PROHIBITS INTERRACIAL COHABITATION, WERE DENIED EQUAL PROTECTION AND DUE PROCESS OF LAW, AS SUCH TERMS ARE ENCOMPASSED BY THE PROVISIONS OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

That act prohibited by Section 798.05, Florida Statutes, is the same act which is prohibited to members of the same race by Section 798.02, Florida Statutes. Such sections read as follows:

Section 798.02, Florida Statutes:

"**Lewd and lascivious behavior.**—If any man and woman, not being married to each other, lewdly and lasciviously associate and cohabit together, or if any man or woman, married or unmarried, is guilty of open and gross lewdness and lascivious behavior, they shall be punished by imprisonment in the state prison not exceeding two years, or in the county jail not exceeding one year, or by fine not exceeding three hundred dollars."

Section 798.05, Florida Statutes:

"**Negro man and white woman or white man and Negro woman occupying same room.**—Any negro man and white woman, or any white man and negro

> woman, who are not married to each other, who shall habitually live in and occupy in the nighttime the same room shall each be punished by imprisonment not exceeding twelve months, or by fine not exceeding five hundred dollars."

It is clear that the terms of Section 798.02, supra, prohibit **intraracially** the same act as is prohibited **interracially** by the terms of Section 798.05, supra.

As can further be seen by reference to the above quoted sections, the maximum punishment provided in Section 798.05, supra, is less than the maximum punishment provided for violations of Section 798.02, supra. Thus, if there is a class distinction made by the two statutes, the present defendants are clearly in the favored class and have no standing on which to urge a constitutional deficiency.

Going outside the statutes and into the facts of the case, we find still further evidence that the appellants herein are not in an unfavored position. Such appellants were convicted in an area the citizens of which are metropolitan, sophisticated, and possessed of a diversified cultural background. The characteristics of such area are generally conducive to racial tolerance, and the sentence of the appellants reflects such fact, such sentence being a nominal thirty-day jail term and a fine of $150.00. The sentence is one which resulted because of a violation of basic concepts of sexual decency and not because of any heated, passionate reatcion based on racial intolerance.

QUESTION II

WHETHER THE INSTANT CASE FORMS A PROPER BASIS FOR PRESENTING FOR JUDICIAL REVIEW THE VALIDITY OF THE MISCEGENATION PROVISIONS OF THE FLORIDA STATUTES AND FLORIDA CONSTITUTION.

It should first be said that there is ample evidence to demonstrate that defendants are not married to each other. The defendant, Connie Hoffman, at the time of entering into the lease for the apartment where the offense here in question was committed represented that a man other than the defendant McLaughlin was her husband (TR 29). Connie Hoffman identified herself by signature as having a last name other than that of the defendant McLaughlin's (TR 38). Approximately one year before the offense was committed, the defendant McLaughlin had, when applying for employment registration, stated that he had a wife named Willie McLaughlin (Tr 119, 132). There was testimony that Connie Hoffman had acknowledged having had a former marriage to one other than McLaughlin. Connie Hoffman, at a date after the offense herein in question was committed, acknowledged that the defendant McLaughlin was not her husband and that she had a husband other than the defendant McLaughlin (TR 135).

The state recognizes that the issue is not whether there was adequate evidence to show that the defend-

ants were **not** married, but whether there was **inadequate evidence** to demonstrate that the defendants **were** married, even if all the evidence favoring the existence of a marriage between the defendants was taken to be true. The sole evidence of a marriage between the defendants is furnished by a statement that Connie Hoffman had represented to the owner of the premises whereon she was residing that Dewey McLaughlin was her husband. Such representation was only placed before the jury by the testimony of the landlady, the owner of said premises; it was not given to the jury by testimony of Connie Hoffman. Such statement was hearsay and incompetent for the purpose of proving a valid existing marriage. The statement was admissible for the purpose of establishing a common law marriage; however, representation by one party is not sufficient to establish a common law marriage and since the record is void of any representation made by the defendant McLaughlin that he was married to Connie Hoffman, it is patent that the evidence is insufficient to establish the defense of marriage.

For the purpose of re-emphasis, even if all of the evidence favoring the existence of a valid marriage between the defendants was believed, there would be still insufficient evidence to establish the existence of such marriage.

The state is not required to prove that the defendants were **not married.** This proposition is supported

by several well known principles of law. The state is not called upon to negate the existence of the exception found in the terms of Section 798.05, Florida Statutes, to wit: marriage. The state is not required to prove the negative, i.e., that the defendants were **not** married. Marriage constitutes an affirmative defense to be proven by the defendants.

It is clear that if the prosecution was required to prove that defendants who engaged in sexual offenses were not married, successful prosecution for such sexual violations would be impossible. An example of the difficulties which would arise may be furnished by considering the possibilities under the well-known Mann Act. A defendant who took a woman across a state line, for a purpose which would not be immoral if such woman and such defendant were married, could always successfully avoid punishment if the prosecution had to show that the defendant and the woman had never been married anywhere in the world. The difficulties which would arise if the rule were different well justify the rule that the existence of marriage must be demonstrated by those who have the peculiar knowledge of such fact, to wit: the defendants themselves. **State vs. McDuffie,** 107 N.C. 885, 12 S.E. 83; **State vs. Naylor,** 68 Okla. 139, P. 889; **People vs. Colton,** 2 Utah 457.

The defendants herein did not demonstrate the existence of marriage; the jury was therefore correctly instructed that the defense of marriage was not avail-

able to the defendants. Thus it is of no consequence that such defense was removed from the consideration of the jury by an instruction to such jury that the defendants could not formalize a common law marriage in the prosecuting state.

There exists under the circumstances in which the instruction was given two adequate state grounds for the upholding of the conviction on appeal in spite of the rendering of the instruction on the invalidity of interracial marriage formalized in the state of Florida:

(1) Section 924.33, Florida Statutes, directs the appellate courts of this state not to reverse unless errors committed by a trial court are of a harmful nature. The error which had the result of denying the defendants the defense of marriage (to which they were not entitled regardless of such error) can not be of a harmful nature.

(2) The second ground is furnished by the failure of the defendants to make any objection to the instruction in question, as is required by Section 918.10, Florida Statutes. Because of such failure the issue involving the correctness of the instruction was never presented to the trial court, and therefore the appellate court was not provided with grounds for reversal, even if the instruction was incorrect, because the trial court could not err on issues not presented or considered.

Even if it were assumed arguendo that the question of the validity of the miscegenation provisions of Florida law were properly presented by the instant case, such question has previously been determined by this court to be of a non-federal nature. In the case of **Naim vs. Naim,** 87 S.E. 2d 749, 197 Va. 80, the Supreme Court of Virginia ruled that a state statute which prohibited interracial marriage did not violate either the federal or state constitution. The United States Supreme Court remanded the case to the state court so that such state court would indicate the true relationship of the parties involved in the case to the State of Virginia (350 U.S. 891, 100 L.Ed. 784). The Virginia court then set out in detail that the parties were so related to the State of Virginia at the time of formulating the marriage as to give the Virginia court jurisdiction to question the validity of such marriage under Virginia law. 197 Va. 734, 90 S.E.2d 849. The Supreme Court of the United States then held, following the determination made by the Virginia Court, that no federal question was involved in the case. 350 U.S. 985, 100 L.Ed. 852. Thus the Supreme Court of the United States held that no federal question was involved in the state statute which prohibited interracial marriage. An analysis of the case reveals that the Supreme Court held that the only constitutional question involved was the question of whether the Virginia law was applicable to the formation of the marriage. It is probable that the United States Supreme Court determined that the relationship of marriage is one which is provided for by the state, and

that such relationship is not secured by any constitutional guarantees of the federal constitution. It may well be that there is nothing in the federal constitution which would prevent the people of the state of Florida from enacting through their Legislature a statute which prohibited all marriage and sexual relations.

Even if the holding of the **Naim** decision, supra, is incorrect, this court should not be led by opposing argument into ruling on a constitutional question of such import as miscegenation in a case the style of which records for eternal history the fact that the parties were not married.

QUESTION III

THE TERMS OF THE STATUTE ARE NOT AMBIGUOUS.

This court does not have before it all of the evidence that the defendant Hoffman is Caucasian and the defendant McLaughlin is Negro. Evidence which is not present here, but which was present during the trial is: the defendants themselves. Since the appellants have not arranged to present such evidence, correct appellate procedure requires that all factual issues to which such evidence is related must be resolved against the appellants. Thus it may be assumed that in fact Dewey McLaughlin has the external physical characteristics of a 100% full-blooded member of the Negro race, and that Connie Hoffman has such characteristics of the Caucasian race as would establish her to be 100% Caucasian.

The gist of the appellants' complaints seems to be that Section 798.05, Florida Statutes, when read with Section 1.01, Florida Statutes, is too exact when using an exact percentage definition of Negro. The mathematical exactness negates the existence of ambiguity; it does not establish it.

It is further significant that the defendants never argued the issue of ambiguity to the Florida Supreme Court. Under Florida law, assignments of error which are not argued are considered abandoned. (See Rule 3.7i, Florida Appellate Rules.) The state would not

wish to urge a technical position in order to avoid an argument which otherwise had merit; however, it is clear that if the other issues argued by the appellants are invalid, their conviction should not be overthrown simply on the basis that Section 798.05, Florida Statutes, when read in conjunction with Section 1.01, Florida Statutes, provides an ambiguous definition of what constitutes a Negro. The sin of such sections, if anything, is over-exactness; it is not ambiguity. It is further clear that even if the sections could be considered ambiguous to some, it is not established that either of the appellants herein were in a position of close proximity to the racial line drawn by Sections 798.05 and 1.01, Florida Statutes. In fact, the contrary must be presumed. Thus the statutes are not ambiguous as to the circumstances of the defendants. The controlling question is whether the defendants were perhaps led into believing that their act was not prohibited. Such was not the case.

QUESTION IV

WHETHER THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION IS OF SUCH VALIDITY AS TO ENABLE THE APPELLANTS TO UTILIZE THE PROVISIONS OF SUCH AMENDMENT IN THEIR ATTACK AGAINST THEIR CONVICTIONS.

Appellants' basis of attack against miscegenation and the alleged discriminatory characteristics of Section 798.05, Florida Statutes, must be supported by the provisions of the Fourteenth Amendment if such attack is to be successful. Article V of the federal constitution provides:

"The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by convention in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth

section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

It is therefore clear that the Senate, as a matter of law, consisted of seventy-two members when the Fourteenth Amendment was proposed on June 8, 1866, (well after the civil war). Article I, Section 3 provided that each state be entitled to two senators. It is therefore clear that as a matter of law, the Senate at the time the Fourteenth Amendment was proposed consisted of 72 seats. The Fourteenth Amendment, as is recorded by Congressional Globe, 39th Congress, First Session 4032, was proposed by only thirty-three members of the Senate. Article V requires that ⅔ of both houses must propose amendments. It is clear that the proposal was made by a number less than the 48 which would have been required if the ⅔ provisions of Article V were honored. The amendment, having been unconstitutionally proposed, can not be constitutionally adopted.

CONCLUSION

WHEREFORE, because of the foregoing reasons, it is respectfully urged that the facts peculiar to the instant case do not support the substantial federal questions which are urged by the appellants. This court is respectfully requested not to render a discrimnatory decision on the adequate questions presented.

Respectfully submitted,

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Counsel for Appellee.

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing Response to Jurisdictional Statement has been furnished by mail this _____ day of March, 1964, to the following as members of counsel for Appellants:

Honorable Jack Greenberg; Honorable James M. Nabrit, III; Honorable Leroy D. Clark; Honorable Robert Ramer; Honorable H. L. Braynon; Honorable G. E. Graves, Jr.; Honorable Louis H. Pollak, and Honorable William T. Coleman, Jr.

_____

Of Counsel for Appellee.